UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Keith Lewis, et al.,	Docket #CV-16-2538 (JFB)(ARL)
Plaintiffs,	
V.	United States Courthouse Central Islip, New York December 14, 2016
Darby Dental Supply, LLC,	4:40 p.m.
Defendant.	

TRANSCRIPT OF DECISION ON THE RECORD
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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THE CLERK: Calling case 16-CV-2538, Lewis vs. Darby Dental Supply. Counsel, please identify yourselves for the record.

MS. SALWEN: Julie Salwen for Plaintiff and -

MR. HARRISON: And David Harrison as well for Plaintiff. Good afternoon.

THE COURT: Good afternoon.

MR. TRIPP: Noel Tripp from Jackson Lewis, along with Marc Wenger and Paul Piccigallo for the defendant. Good afternoon, Your Honor.

THE COURT: Good afternoon. As you know, I scheduled this. I wanted to place the court's ruling on the record with respect to the pending motion for partial dismissal of the second amended complaint. If you want to order a copy of the transcript of this ruling, you can do so through the clerk's office. So, I just ask you to bear with me. It'll take about 10 minutes or so to place the court's ruling on the record.

For reasons I'll outline in detail in a moment, the motion for partial dismissal of the second amended complaint is denied in it's entirety, and that includes the motion to strike the class and collective allegations from the amended complaint. In terms of the standard for a motion to dismiss under 12(b)(6), I adopt the standard set forth in a prior opinion of mine DeSliva v. North Shore Long Island Jewish

Health System, Inc., 770 F.Supp 2nd 497 Eastern District of New York, March 16th, 2011. In short, as both sides understand and agree, the standard is the court accepts the allegations in the complaint as true, drawing all reasonable inferences in the Plaintiff's favor in determining whether a plausible claim exits, and that's the standard court is applying here.

First, with respect to the off the clock claim under the FSLA and state law, I find that it is sufficiently pled to state a plausible claim, the pleading requirements for the FSLA, which is similar to state law, are set forth in the DeSilva opinion. In applying that to this particular case, I believe there's certainly sufficient detail to state a plausible claim, notwithstanding the defendant's arguments. With respect to the complaint, the second amended complaint sets forth the number of hours alleged, which was an issue in DeSilva but is not an issue here. Specifically, paragraph 48 states -- estimates two to four hours each week of off the clock work. It alleges the type of off the clock work, in paragraphs 36 talks about making and receiving calls and texts from dental customers during lunch and before and after regular workday. Paragraph 37 also makes reference to inner search -- internet research in connection was done on various dental products. So, it certainly alleges the type of work so that the defendant's on notice as to the nature of the claim. The amended complaint also alleges the defendants knew about

this off the clock work. Paragraph 42, that statement is also supported by specific allegations in terms of details of what the basis is for that allegation of knowledge of how they knew. For example, paragraph 33 states the defendant's supervisor encouraged the plaintiffs to provide their cell phone numbers. Paragraph 43 says they discussed the off the clock calls with managers. The plaintiffs discussed the off the clock calls with managers and supervisors to address issues that came up during those calls. Paragraph 44 alleges pizza was ordered and they were encouraged to do work during the lunch. So, certainly a plausible claim -- allegations regarding defendant's knowledge about the off the clock work, have been stated to support a plausible claim.

As discussed in the briefs and oral argument, defendants point out there's no specific allegation that the defendants knew that the plaintiffs were not seeking compensation for that off -- that work that took place during the lunch or just before or after work. Even in the absence of a specific allegation of knowledge that they weren't seeking compensation for that work, I believe that a reasonable inference could be drawn from the complaint with respect to that. For example, as it relates to the lunch issue, paragraph 44 states that the supervisors had the plaintiffs clock out for lunch to eat pizza while they were working, so that certainly would suggest that they were aware that they weren't seeking compensation

for that or the supervisor wouldn't have had them clock out. Also paragraph 34 talks about the tracking system that calls only tracked at the work station. And paragraphs 45 and 46 note that the tracking system should have alerted defendants to the fact that work was being done off premises. And also I think a reasonable inference could potentially be drawn from the number of hours per week if it's efficiently substantial that someone would notice the lack of any reporting of those hours for purposes of compensation.

So, for all those reasons, I find that those claims have sufficiently been pled to put the defendant on notice as to the nature of the claim and to state a plausible claim under both federal and state law. Obviously, these issues regarding the various elements can be raised at summary judgment once there's been discovery with respect to that claim and the other claims. With respect to the section 195 sub-section 3 claim under New York law, the defendants argue that the section only pertains to hours compensated being properly reflected on the wage statement and not hours worked, thus defendants contend that -- that with respect of off the clock uncompensated hours, failing to be reflected in the wage statements, that that can't be a violation as a matter of law under section 195. There appear to be no New York cases on this issue. Judge Block entered a 2015 opinion in Copper v. Calvary Staffing, LLC 132 F.Supp .3d 460 2015. As a matter of

first impression, you stated that just based upon the statutory language which refers specifically to hours worked, not hours compensated, that the plain meaning would support a plausible claim in this type of situation. I suggested at oral argument to defense counsel that it might make sense to defer this issue to summary judgment, in light of the fact that it wouldn't change the discovery in the case but I think the argument was made that they're entitled to know whether or not the claim is in the case or not regardless of its impact on discovery. So, in light of that, my ruling is on agreeing at this point, with Judge Block. I believe the statutory language certainly would support the plaintiff's interpretation of the statute. I understand the defense argument that that would create liability in essentially every situation similar to the one we have in this situation, assuming that there was off the clock uncompensated work it would -- should already be not reflected in the wage statement, and therefore a violation of that provision as well. But notwithstanding that, legislatures are obviously free to enact laws as they see fit and I'm going to go along at this point with Judge Block's opinion. I'm agreeing with the use of the plain meaning of the statute to allow this claim to go forward. The denial of the motion to dismiss on this claim is obviously, again, without prejudice and can be raised at the summary judgment stage, maybe there will be New

York cases for the -- articulate -- New York court cases that will further articulate for this issue, but I'm allowing this claim to proceed as well at this point. With respect to the motion to strike the class, collective action allegations, first I just -- with respect to the standard for a motion to strike. I set that forth, that standard in a case called Calibuso v. Bank of America Corporation 893 F.Supp .2d 374 Southern District of New York 2012. And I adopt again that standard in its entirety. I noted in that case that motions to strike of this nature are generally looked upon with disfavor because plaintiffs haven't even moved at this point, for a class action or collective action. In the absence of such a motion, generally, a motion to strike such allegations is usually viewed by courts as premature. But putting that aside, the -- I've looked at the issue in any event and I reject the arguments made by the defendants at this point. There was one argument made is that the allegations are too individualized to support any type of class or collective allegation. Paragraphs 34, excuse me, 32 through 48 plainly allege that this was a policy that not only applied to the plaintiffs but other account managers. It states clearly that it was encouraged and applied in the same way basically across all the account managers. So, there's certainly sufficient allegations to allege that this was a policy and was being implemented in the same way with respect to all the account

managers. The fact that they met at different hours, obviously wouldn't impact the ability to be a class action or collective action, assuming that the hours were otherwise actionable. The second argument was that 29 USC Section 207(i) applies because the second amended complaint establishes that Darby is a retail or service establishment and defeats any ability to bring this as a class or collective action. Putting aside the issue of whether or not it's an affirmative defense, there is certainly case law to suggest that that's an affirmative defense. But even assuming that it's not, I don't believe that it can be resolved at this juncture. It's a very fact specific inquiry as discussed in detail in the Charlotte v. Echo Lab Inc. opinion 136 F.Supp 3433 Eastern District of New York 2017. And here paragraph 17 alleges supplies that defendant sells to dental clinics and others are re-sold to dental patients, certainly efficiently alleges for purposes of pleading, the re-sold aspect that would overcome the defendant's argument with respect to this issue. I mean, obviously the Halperin declaration tries to address this issue, but I don't believe that a motion to dismiss, or motion to strike, however you characterize it, that the court should be going outside the pleadings at this point, to engage in a more fact specific analysis of the nature of the resells with respect to this particular company and what percentages of its business that it is. So, I also

note the defense cites a number of cases in support of their position, but I believe most, if not all, of those cases are summary judgment cases. So, I don't believe that this can be resolved in this case at this juncture until the motion to strike the class or collective allegations, based upon that argument is also denied without prejudice to being renewed at the summary judgment stage. So, that's the decision of the court. Given the holidays, does the defense want a little extra time to file an answer?

MR. TRIPP: Your Honor, this is Mr. Tripp. If we could have 30 days to file the answer -

THE COURT: That's fine.

MR. Tripp: -- and -

THE COURT: January 16th?

MR. TRIPP: That would be fine, Your Honor, thank you.

THE COURT: Actually, that's a holiday. The 17th, January 17th.

MR. TRIPP: Understood.

THE COURT: Okay, any -- are there any other issues? Obviously, the magistrate judge will be -- have you had a conference with the magistrate judge yet or no?

MR. TRIPP: We have not, Your Honor, and to that point, you know, defendants obviously -- in terms of the merits of the FSLA claim, defendant would certainly be willing

to continue the toll to go discover the issue that have been laid out already. Again, in hopes of avoiding a potentially burdensome notice to a putative collective that defendant doesn't believe will have any claim, and would like to discover that as efficiently as possible.

THE COURT: Well, again, you can -- you can discuss both the timing and the scope and prioritization of the discovery with the magistrate judge once you have the initial conference. So, well actually Judge Lindsay -- I think a lot of times she does it based upon papers, I'm not even sure she -- that she -- I'm not even sure she has an initial in-person conference. But in any event, we're going to contact her chambers and let her know we've decided the motion. The case should proceed with discovery but it might behoove you to try to work out together, you know, the scope and the schedule with regard to discovery and just submit it to her. But that's up to you. Okay?

MR. TRIPP: Understood.

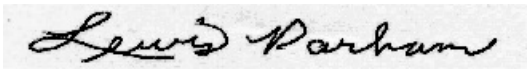
THE COURT: All right. Thank you, counsel. Have a good night.

ALL: Thank you, Your Honor.

(Court adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



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